THE PUBLIC AUTHORITY

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If there is one area of agreement between the proponents and opponents of the public authority, it is that the authority is one of the most significant and widespread developments in state and local government in the past quarter of a century.[1] Today, state and local governments employ authorities for such varied purposes as the construction and operation of transportation services, marketing facilities, recreation centers, public utilities, schools, airports, bridges and turnpikes.[2] Authorities now represent several billions of dollars in capitalization and their obligations are significant on the investment market.[3]

The rapid growth of the authority and the increased reliance upon its use has raised challenging questions concerning its appropriateness as an instrument of government.[4] The purpose of this article is to discuss briefly the history and nature of the public authority, to examine its advantages and disadvantages and to suggest areas in which the authority may be most appropriately utilized.

Nature and History of the Public Authority

Briefly, a public authority is a corporate body authorized by legislative action to function outside of the regular structure of state or local government in order to finance, construct and usually to operate revenue-producing enterprises.

The states have provided for the creation of authorities in various ways. In most jurisdictions, authorities, especially on the state level,

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1. Council of State Governments, Public Authorities in the States, *Forward* (1953); Fordham, Local Government Law 25 (1949); Temporary State Commission on Coordination of State Activities, First Interim Staff Report on Public Authorities Under New York State 23 (1954).

2. A list of the major road, bridge and tunnel authorities, port dock and terminal authorities, state building authorities, and water and power authorities is contained in Council of State Governments, *op. cit. supra* note 1, at 30-35.

3. See *The State and Municipal Hundred Million Club,* The Bond Buyer, Dec. 10, 1956, p. 68.

4. Concern at the ramifications of the increase of authorities has been expressed by the Governors' Conference, by the President's Committee on Administrative Management, by the Hoover Commission and by many others. See, *e.g.,* Council of State Governments, *op. cit. supra* note 1, *Foreward;* Fordham, A Larger Concept of Community 23-25 (1956); Temporary State Commission on Coordination of State Activities, *op. cit. supra* note 1, at 24.

are created by special acts of the legislature. Such, for example, is the pattern in New York.[5] Other states authorize the creation of public authorities under general enabling acts. The outstanding example is Pennsylvania which, under The Municipality Authorities Act of 1945,[6] enables local governments to create local authorities to operate a broad variety of projects. Some states such as Alabama and Michigan permit the establishment of authorities for limited purposes, such as the construction of industrial and commercial buildings for rental to private business [7] or the construction of off-street parking facilities.

In general, the authority has the status of a public corporation [8] and may make contracts, acquire and dispose of real and personal property, sue and be sued, borrow money and issue evidences of indebtedness, fix rates and collect fees or charges for the use of facilities, and hire personnel.[9]

The authority is usually managed by a board or commission which determines policy within the framework of the authority's jurisdiction and approves, modifies or rejects actions suggested by a full-time employee who serves as the principal executive officer of the board. The members of the authority are generally appointed—by the governor, in the case of a state authority, and by the mayor or city council, in the case of a local authority—and often serve without salary.[10] Fre-

5. In 1938, following the recommendations of The Moffat Committee, a constitutional amendment was passed in New York requiring that all authorities be created by special act of the legislature. See Joint Legislative Committee on State Fiscal Policies, *Report,* N.Y. Leg. Doc. No. 41, C. 8 (1938).

6. Pa. Stat. Ann. tit. 53, § 29002-5 (Purdon Supp. 1955) provides: "A. Every Authority incorporated under this act . . . shall be for the purpose of acquiring, holding, constructing, improving, maintaining and operating, owning, leasing, either in the capacity of lessor or lessee, projects of the following kind and character, buildings to be devoted wholly or partially for public uses, including public school buildings, and for revenue-producing purposes; transportation, marketing, shopping, terminals, bridges, tunnels, flood control projects, highways, parkways, traffic distribution centers, parking spaces, airports and all facilities necessary or incident thereto, parks, recreation grounds and facilities, sewers, sewer systems or parts thereof, sewage treatment works, including works for treating and disposing of industrial waste, . . . steam heating plants and distribution systems, incinerator plants, waterworks, water supply works, water distribution systems, swimming pools, playgrounds, lakes, low head dams, hospitals, motor buses for public use, when such motor buses are to be used within any municipality, and subways. . . ." Under this broad grant, authorities at the local level have had their greatest prevalence in Pennsylvania. See Lindsay, *The Municipal Authority in Pennsylvania,* Pa. Dep't of Internal Affairs Monthly Bull., Aug. 1951, p. 16; The Bond Buyer, March 21, 1953.

7. Council of State Governments, *op. cit. supra* note 1, at 36.

8. In some cases, an authority may lack corporate status, although it possesses many corporate attributes; examples are the Pennsylvania Turnpike Commission, the State Bridge Commission of Ohio, the Washington Toll Bridge Authority and the West Virginia Turnpike Commission.

9. See Nehemkis, *The Public Authority: Some Legal and Practical Aspects,* 47 Yale L.J. 14 (1937).

10. For a survey of the tenure compensation and other incidents of membership some typical authorities, see Council of State Governments, *op. cit. supra* note 1, at 40-49.

quently one or more state officials serve on the authority as *ex officio* members.[11]

Authorities generally are exempt from the usual governmental controls and act independently in such areas as personnel administration, accounting, budget, purchasing, financial management and legal services.

The most prominent feature of the authority lies in the use of revenue bond financing. In general, revenue bonds are obligations whose interest and principal are to be paid solely from the revenues earned by the facilities constructed from the proceeds of the bond sales, as distinguished from the tax-supported general obligation of regular governmental units. They do not require a pledge of the credit of the state or municipality, and are not regarded as general obligations of the state.[12]

The form of the authority was shaped by several needs. As a reaction to speculative and irresponsible financial spending by state and local governments in the middle 1800's, constitutional provisions were adopted in numerous states severely limiting the borrowing power.[13] The debt restrictions of the nineteenth century, however, did not restrict the demands of the twentieth. With urbanization and industrialization came not only the need for the expansion of existing public facilities, but also a new concept of the sphere of local and state government which resulted in demands for many services which had hitherto been considered the domain of private enterprises. These demands, coupled with increased resistance to increases in taxation, led to intense pressures upon the local government to find means to finance public improvements through borrowing that would not conflict with debt limitations. At the same time the corporate form of organization became a symbol of efficient business management that was thought adaptable to the management of public enterprises. Finally, there was

11. *Ex officio* members generally predominate in the case of building authorities since such authorities are established primarily to facilitate the programs of particular governmental agencies. Among the non-building authorities, *ex officio* members are found most frequently in those administering roads, bridges and market facilities. *Ex officio* membership is relatively infrequent in other types of authorities. *Ibid.*

12. The most comprehensive recent text on revenue bonds is CHERMAK, THE LAW OF REVENUE BONDS (1954). Thorough earlier works are FOWLER, REVENUE BONDS (1938); KNAPPEN, REVENUE BONDS AND THE INVESTOR (1939). It should be noted that authority bonds may pledge the general obligation of the authority, but this does not place the bonds in the general obligation bond category, since the authority lacks the taxing power.

13. Constitutional restrictions were first applied to the state as a reaction to imprudent fiscal policies incident to canal improvements, railroad aid and other costly internal improvements. See SECRIST, AN ECONOMIC ANALYSIS OF THE CONSTITUTIONAL RESTRICTIONS UPON PUBLIC INDEBTEDNESS IN THE UNITED STATES 13-26 (1914). Restriction of municipal indebtedness appeared sporadically in the 1850's and the 1860's and received significant impetus as a result of the economic crisis of 1873-1874. For a concise history of such restrictions, see Williams & Nehemkis, *Municipal Improvements as Affected by Constitutional Debt Limitations*, 37 COLUM. L. REV. 177 (1937).

a need to develop an effective agency to handle interstate and intercommunity problems.[14]

Although public authorities appeared in this country [15] as early as the 1890's,[16] the first major impetus to the authority movement took place with the establishment of the Port of New York Authority in 1921.[17] Within the five year period between 1926 and 1931, the Authority had marketed $142,000,000 in bonds secured by the revenues of bridges, tunnels and other authority projects.[18] That body, with its striking record, was the star that the coming galaxy of authorities sought to emulate.

The depression, which brought about an increase in public work construction as a means of stimulating recovery, also brought about a shrinkage in the assessed valuation of taxable property and hence a reduction in borrowing power. This accentuated the need for revenue bond financing and proved a stimulus to the growth of public authorities.[19] Encouragement came also from the federal government through such measures as the power of the Reconstruction Finance Corporation to lend funds for self-liquidating projects of public bodies, the letter in 1934 from President Roosevelt to the governors of the states suggesting the adoption of legislation that would authorize revenue bond financing and the creation of public authorities,[20] and the financial assistance provided by the United States Housing Act of 1937. As a result, between 1933 and 1939 there were widespread enactments of revenue bond legislation and of statutes authorizing local governments to establish authorities for a variety of purposes.[21]

14. See generally COUNCIL OF STATE GOVERNMENTS, *op. cit. supra* note 1, at 22-28; Nehemkis, *supra* note 9.

15. The authority, of course, is not indigenous to the United States. See, *e.g.*, WEBB, STATUTORY AUTHORITIES FOR SPECIAL PURPOSES 17 (1922).

16. For example, the Kennebeck District in Maine with many of the incidents of the modern authority was created in 1899. See KNAPPEN, *op. cit. supra* note 12, at 227.

17. For an excellent brief history of the New York Port Authorities, see Goldstein, *Metropolitan Area Government—A Functional Approach, the Authority Role,* The Bond Buyer, Sept. 8, 1956, p. 3. See also BARD, THE PORT OF THE NEW YORK AUTHORITY (1939); BIRD, A STUDY OF THE NEW YORK PORT AUTHORITY (1949).

18. Netherton, *Area-Development Authorities: A New Form of Government by Proclamation,* 8 VAND. L. REV. 678, 680 (1955). Among the facilities of the New York Port Authority are the Bayonne Bridge, George Washington Bridge, Goethals Bridge, Holland Tunnel, Lincoln Tunnel, New York Truck Terminal, Newark Truck Terminal, Port Authority Bus Building, La Guardia Airport, Newark Airport and New York International Airport.

19. For a concise summary of the development of revenue bond financing, see Fordham, *Revenue Bond Sanctions,* 42 COLUM. L. REV. 395, 400-01 (1942).

20. Discussed in Foley, *Revenue Financing of Public Enterprises,* 35 MICH. L. REV. 1, 5 (1936).

21. At least nineteen states enacted statutes creating authorities for financing revenue producing projects between 1933 and 1936. An appendix to Foley, *supra* note 20, at 30-39 contains a useful index of the early legislation. The bulk of the housing authority legislation was enacted between 1936 and 1941.

World War II brought a halt to state and local construction programs and hence witnessed the creation of relatively few authorities. In the postwar era, however, the demand for public improvements grew apace. Authorities, popularized as a quick means of realizing new facilities, have not only multiplied with vigor but have found use in new areas such as toll road operation, port development and government building.

With this brief background, the advantages and disadvantages of the authority may perhaps be best assessed by examining its functions in the following areas: (1) financing; (2) management; and (3) planning and responsibility.[22]

FINANCING

One of the primary advantages claimed for the authority is that it permits the financing of improvements outside state constitutional debt limitations.[23]

The states whose constitutions do not restrict public borrowing are few.[24] Most state constitutions either prescribe that public borrowing may take place only where approval is received by popular referendum[25] or proscribe any debt (with minor exceptions) beyond an amount which most of these states long ago reached.[26] Local government debt is also restricted, generally by the limitation based on the "debt-to-property" ratio under which indebtedness is limited to a fixed percentage of taxable property in the local government unit.[27]

With the path to constitutional amendment of debt limitations generally blocked by vociferous and articulate advocates of governmental economy, as well as by the complications of the amending

22. Manifestly, variations in the authority operation are numerous and hence exceptions will be found to almost any general statement made. The discussion that follows, however, is based on the prevailing pattern of authority operation.

23. TEMPORARY STATE COMMISSION ON COORDINATION OF STATE ACTIVITIES, *op. cit. supra* note 1, at 34; WEINTRAUB & PATTERSON, THE 'AUTHORITY' IN PENNSYLVANIA, PRO AND CON 3 (Bureau of Municipal Research of Philadelphia 1949).

24. In the following states, the legislature for all practical purposes has control over borrowing: Connecticut, Delaware, Maryland, Massachusetts, Mississippi, New Hampshire, Tennessee and Vermont. COUNCIL OF STATE GOVERNMENTS, *op. cit. supra* note 1, at 17. A table showing the various state limitations on borrowing appears in *id.* at 15.

25. States in this category are: Arkansas, California, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Missouri, Montana, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, South Carolina, Virginia, Washington and Wyoming. *Id.* at 17.

26. States in this category are: Alabama, Arizona, California, Florida, Georgia, Indiana, Louisiana, Michigan, Minnesota, Nebraska, Nevada, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Texas, Utah, West Virginia and Wisconsin. *Ibid.*

27. The lack of a current rational basis in such limitations is concisely set forth in CHERMAK, THE LAW OF REVENUE BONDS 85-86 (1954).

process,[28] it was natural for state and local governments to cast about for a means to borrow funds unfettered by constitutional provisions. One such method lay in the creation of an obligation which would not be considered of the type of debt limited by the state constitution.

As early as 1895, the Supreme Court of Washington was persuaded that a bond, the principal and interest of which were payable wholly out of the revenues of the facility financed from the proceeds of the bond, did not constitute debt within the meaning of the constitutional restriction.[29] This theory, which became known as the "special fund doctrine," found acceptance in western [30] and middle-western [31] states and formed the basis for the issuance of revenue bonds in those states.

In some states, however, early attempts by municipalities to except revenue-type financing from debt limitations were struck down with the admonition that one cannot achieve by indirection what cannot be done directly.[32] In other states, the courts announced a "limited" or "restricted special fund" doctrine in holding that revenue bonds did not escape constitutional limitations unless the bonds were to be paid solely from the revenues of the project financed, and not from the revenues of the entire system to which the improvement was to be an addition.[33]

The strongest resistance to winking at constitutional limitations came where the attempt was made to issue bonds for the construction of clearly non-revenue producing facilities, such as schools, hospitals and public buildings, by pledging the proceeds of special funds such

28. In Pennsylvania, for example, a constitutional amendment requires adoption at two sessions of the General Assembly followed by approval of the electorate. PA. CONST. art. XVIII, § 1.

29. Winston v. Spokane, 12 Wash. 524, 41 Pac. 888 (1895); *cf. In re* Canal Certificates, 19 Colo. 63, 34 Pac. 274 (1893).

30. Farmers State Bank v. City of Conrad, 100 Mont. 415, 47 P.2d 853 (1935); Butler v. City of Ashland, 113 Ore. 174, 232 Pac. 655 (1925).

31. Underwood v. Fairbanks, Morse & Co., 205 Ind. 316, 185 N.E. 118 (1933); Carr v. Fenstermacher, 119 Neb. 172, 228 N.W. 114 (1929); Lang v. City of Cavalier, 59 N.D. 75, 228 N.W. 819 (1930).

32. Byars v. City of Griffin, 168 Ga. 41, 54-55, 147 S.E. 66, 72 (1929); Feil v. City of Coeur d'Alene, 23 Idaho 32, 50, 129 Pac. 643, 649 (1913); Baltimore v. Gill, 31 Md. 375, 390 (1869); Newell v. People, 7 N.Y. 893 (1852); Zachary v. City of Wagoner, 146 Okla. 268, 270-71, 292 Pac. 345, 348 (1930); Hesse v. Watertown, 57 S.D. 325, 346, 232 N.W. 53, 63 (1930). Typical language was that of the court in Lesser v. Warren Borough, 237 Pa. 501, 513-14, 85 Atl. 839, 843 (1912): "To permit a borough or city to borrow money under a contract that it shall not be liable for its repayment, but that the lender must look solely to pledged municipal property or assets, would, in effect, annul the constitutional restriction on municipal improvidence, and strike down a safeguard against municipal profligacy."

33. The leading "limited special fund" case is City of Joliet v. Alexander, 194 Ill. 457, 62 N.E. 861 (1902). Subsequent decisions have overruled this case: Ward v. Chicago, 342 Ill. 167, 173 N.E. 810 (1930); Poole v. City of Kankakee, 406 Ill. 521, 94 N.E.2d 416 (1950). However, the doctrine has been adopted by other states. See Williams & Nehemkis, *supra* note 13, at 210-11.

as license fees and cigarette taxes. Even some states which accepted the special fund doctrine held that such issues fell directly within the purpose of the debt limitation, since the improvements were not self-liquidating in that the revenues were not earned by the structures financed by the bonds.[34]

It was not surprising, therefore, particularly in those states in which courts rejected or restricted the special fund doctrine, that wary legislators should seek to meet financing needs through the authority device. For one, the device proved a means to approach the court with a new conception; for another, it was thought to be a more subtle subterfuge, since "independence" from the state governmental structure was an additional argument on which to base exemption from state debt limitations.

It is not entirely clear why certain courts should have found it easier to appreciate that the pledge of revenues of authority facilities is less a debt within the constitutional sense than the pledge of a municipality of the revenues from improvements. Nevertheless, whether through subtlety or sophistry, it was the authority that demonstrated the victory of indirection, and won significant support in such cases as *Tranter v. Allegheny County Authority* [35] and *Robertson v. Zimmerman.*[36] Subsequent decisions sanctioned authority bond financing even for non-revenue producing facilities,[37] and set a pattern for expanded use of the authority in those states [38] as well as in others.[39]

34. State *ex rel.* Fletcher v. Executive Council, 207 Iowa 923, 223 N.W. 737 (1929); Boswell v. State, 181 Okla. 435, 74 P.2d 940 (1937).

35. 316 Pa. 65, 173 Atl. 289 (1934). To the argument that Lesser v. Warren Borough, 237 Pa. 501, 85 Atl. 839 (1912) had held that the state constitutional debt limits cannot be indirectly evaded by means of the authority device, the court said: "It is never an illegal evasion to accomplish a desired result, lawful in itself, by discovering a legal way to do it." 316 Pa. at 84-85, 173 Atl. at 298-99. Lesser v. Warren Borough, *supra*, was distinguished on the ground that there the borough's bonds were to be secured not alone by the revenue from the waterworks proposed to be purchased, but by the waterworks itself.

36. 268 N.Y. 52, 196 N.E. 740 (1935). See Williams & Nehemkis, *supra* note 13, at 206.

37. The Pennsylvania Supreme Court, for example, in an agonizing reappraisal and reversal of a decision a year earlier, Kelley v. Earle, 320 Pa. 449, 182 Atl. 501 (1936), held safe from constitutional attack a scheme whereby an authority used the proceeds of bonds to build a structure, leased it to the regular governmental unit and retired the bonds from the rental on the lease. Kelley v. Earle, 325 Pa. 337, 190 Atl. 140(1937).

38. Greenhalgh v. Woolworth, 361 Pa. 543, 64 A.2d 659 (1949) held that a school building constructed by the State Public Authority was "self-liquidating" where the annual rentals used to discharge debt and interest charges were payable out of current revenues drawn in part from the local school tax levy and part from funds allocated by the state. See also Datweder v. Hatfield Borough School District, 376 Pa. 555, 104 A.2d 110 (1954).

39. *E.g.*, Becker v. Albion Jefferson School Corp., 132 N.E.2d 269 (Ind. 1956); Book v. Indianapolis-Marion Bldg. Authority, 126 N.E.2d 5 (Ind. 1955); Walinske v. Detroit-Wayne Joint Bldg. Authority, 325 Mich. 562, 39 N.W.2d 73 (1949) (authority to finance construction of joint county and city building approved, relying largely on Kelley v. Earle, 325 Pa. 337, 190 Atl. 140 (1937)), 34 MINN. L. REV. 360 (1950). *But see* Curlin v. Wetherby, 275 S.W.2d 934 (Ky. 1955); State *ex rel.* Washington State Bldg. Financing Authority v. Yelle, 47 Wash. 2d 705, 289 P.2d 355 (1955).

But the field of municipal finance has not remained static. Granted that in some jurisdictions restrictions on state and municipal borrowing once presented a compelling reason for the use of authorities, that compulsion now appears largely non-existent, at least in the case of revenue-producing facilities. Today most courts, more sophisticated in the necessities of municipal finance and less sympathetic with archaic constitutional restrictions, have granted considerable leeway to local governments, and their revenue financing is on terms equal with those of authorities.

The special fund doctrine, under which an obligation payable wholly out of the net operating revenues of the enterprise which it finances is excluded from constitutional debt limitations, has won approval in almost all of the states having constitutional municipal-debt limits.[40] There has also been wide acceptance of the "expanded special fund theory" under which the state or local government may pledge the revenues of any existing revenue-producing utility for the purpose of constructing or acquiring a different type of utility.[41]

Likewise, in many states, the financing even of non-revenue producing structures and services has withstood the confinement of constitutional clauses without resort to the authority device. For example, in the case of educational facilities, approval has been given to the construction of dormitories financed by revenue bonds secured by the pledge of such revenues as earnings of the university press [42] and fees from other halls; [43] in the case of a state hospital, the pledge of contributions made by counties for services rendered to their residents has been found acceptable; [44] and in recreational facilities, the pledge of excess revenues of an electric plant supported the construction of an auditorium, field house and swimming pool.[45]

40. Decisions in the following twenty-seven states prescribe to the special fund doctrine: Arizona, Arkansas, Colorado, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Oregon, South Carolina, Texas, Washington, West Virginia, Wisconsin and Wyoming. Cases are cited in Annot., 146 A.L.R. 604 (1943). In Connecticut, Delaware, New Hampshire, New Jersey, Tennessee and Vermont, there are no constitutional municipal debt limits. In four states, the authority to issue revenue bonds independent of the special fund doctrine is in the constitution: GA. CONST. art. VII, § 2-6005; PA. CONST. art. IX, § 8; VA. CONST. § 127.

41. The question of whether a municipality may secure the payment of the bonds by a mortgage, not only upon the newly-acquired properties but also upon properties which it had previously owned is a much disputed one. See discussion in WOOD, LEGAL PROBLEMS INCIDENT TO REVENUE BOND FINANCING 8-9 (National Institute of Municipal Law Officers Report No. 112, 1945).

42. Fanning v. University of Minnesota, 183 Minn. 222, 236 N.W. 217 (1931).

43. Barbour v. State Board of Education, 92 Mont. 321, 13 P.2d 225 (1932).

44. State *ex rel.* Hawkins v. State Board of Examiners, 97 Mont. 441, 35 P.2d 116 (1934).

45. McKinney v. Owensboro, 305 Ky. 254, 203 S.W.2d 24 (1947). See generally CHERMAK, *op. cit. supra,* note 12, at 100-24; Stamps, *Municipal Financing of the Changing Southland,* The Bond Buyer, Nov. 30, 1953, pp. 26-27.

Courts in some states have sanctioned the financing of non-revenue producing structures and services through borrowing which is repayable from special tax sources, so long as they are not property taxes; these sources include gasoline taxes,[46] liquor and cigarette taxes[47] and similar levies.[48] Indeed, in South Carolina[49] a school bond issue was held not to fall within constitutional debt limitations where the pledge for the payment of the debt service included the "full faith, credit and taxing power of the state," as well as the revenue from a retail sales levy.[50]

Thus, except in the case of the relatively few states which refuse to recognize the special fund doctrine or restrict it so as to limit practical use, it would appear that constitutional limitations on state and local borrowing are not the obstacle they once were, or are still thought to be.[51] Municipalities have or may be given resort to revenue bond

46. State v. Florida State Improvement Comm'n, 160 Fla. 230, 34 So. 2d 443 (1948); *cf.* Banner v. City of Laramie, 74 Wyo. 429, 289 P.2d 922 (1955) (revolving fund of city, composed of proceeds from gasoline and cigarette taxes, created to guarantee sufficiency of special assessments pledged to secure city bonds).

47. State v. Tampa, 72 So. 2d 371 (Fla. 1954); Moses v. Meier, 148 Ore. 185, 35 P.2d 981 (1934); Gruen v. Tax Comm'n, 35 Wash. 2d 1, 211 P.2d 651 (1949).

48. State v. Miami, 76 So. 2d 294 (Fla. 1954); Foltz v. Indianapolis, 130 N.E.2d 650 (Ind. 1955) (on-street parking meter revenues to finance off-street parking facilities); Comereski v. Elmira, 308 N.Y. 248, 125 N.E.2d 241 (1955) (same). See generally ABA SECTION OF MUNICIPAL LAW, COMMITTEE ON SPECIAL REVENUE AND AUTHORITY OBLIGATIONS, REPORT (mimeo. 1956).

49. State *ex rel.* Roddey v. Byrnes, 219 S.C. 485, 66 S.E.2d 33 (1951). *Contra,* Curlin v. Wetherby, 275 S.W.2d 934 (Ky. 1955).

50. As to the moral implication of such facile escape from constitutional limitations, the South Carolina court found "little difference" between its view and the more usual application of the special fund theory on the ground that it did not believe that "a state in this enlightened day would allow its so-called revenue bonds to go unpaid, irrespective of its technical, legal liability." The court went on to point out that the bond buyers pay higher prices for bonds in the nature of general obligations than for restricted revenue bonds. "Thus it may be said that our rule is of practical advantage, without sacrifice of principle." State *ex rel.* Roddey v. Byrnes, 219 S.C. 485, 507-08, 66 S.E.2d 33, 42 (1951).

51. It should also be pointed out that in some states constitutional amendments have been adopted easing debt limitations. In New York, for example, article VII, § 5(c) of the New York constitution was revised in 1951, providing, *inter alia,* for the exclusion of indebtedness for public improvements or services, annually and proportionately to the extent that it yields net revenue to the municipality if the revenue is at least twenty-five per cent or more of the amount required in that year for interest and amortization payments. It was the intent of the sponsors of the revised § 5(c) that it would eliminate much of the necessity and pressure for the creation of public authorities at the local level. Upon the basis of this section the Governor of New York refused approval of legislation for the creation of several public authorities at the municipal level, in one instance stating that "it may be remarked that as a result of a constitutional amendment . . . constitutional debt limits no longer stand in the way of development of facilities in a city." TEMPORARY STATE COMMISSION ON COORDINATION OF STATE ACTIVITIES, *op. cit. supra* note 1, at 35-36. However, since 1951 when the amendment was adopted, there has not been a noticeable decline in New York in the request of municipalities for the creation of public authorities.

In Pennsylvania, article IX, § 8 of the Pennsylvania constitution excludes from the determination of Philadelphia's borrowing capacity debt incurred to finance public improvements that may reasonably be expected to yield revenue in excess of operating expenses sufficient to pay the interest and sinking fund charges. See Philadelphia Peti-

financing without the necessity of using the authority device. Accordingly, relief from constitutional debt limitations does not, in most states, provide an adequate ground for authority financing. If the authority is to be justified, it must be on another basis.[52]

MANAGEMENT

Another frequently heard advantage claimed for the authority is that it brings to public functions the characteristics of business enterprises, and thus enhances the efficiency of government in achieving its objective.[53]

As a primary demonstration of this thesis, it is contended that the public authority is managed by more capable men than are regular government offices. Since members of the authority generally are not paid and because the authority is largely independent of the state or municipal government, it is thought that the authority will attract successful and public-minded businessmen who will run it with the same initiative and success demonstrated in their private business.[54]

As further demonstration of the advantages of authority operation, there is cited its independence and freedom from the inflexibility and red tape of traditional governmental in such matters as the hiring of personnel, purchasing and other managerial controls. This thesis, if sound, is an alarming one. As Dean Fordham has observed:

> "Local government of any size is big business, and we need good management and efficiency throughout. If we cannot substantially achieve them, short of diffusing various functions among a variety of ad hoc units, we are indeed in a bad plight." [55]

But, along with Dean Fordham, the writer believes that it is the thesis, rather than the plight, that requires examination. In apprais-

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tion, 89 Pa. D. & C. 189 (1954) (improvements to water and sewer systems and to transit facilities). Nevertheless, in 1954 Philadelphia created a municipal airport authority for self-sustaining projects at the city's airport. On more mature reflection, the city fathers have kept the authority largely inactive and have financed its airport projects through regular city channels.

52. Aside from lack of advantage, there are disadvantages to authority financing. These go largely to the question of responsibility and are discussed at pp. 568-69 *infra*.

53. See *Toll Roads and Toll Authorities*, 26 STATE GOV'T 157, 167 (1953).

54. "The entire nature and purpose of the authority requires that its board members possess considerable freedom and independence, that they be experienced in the technique of corporate management, that they have a high service of public responsibility, and that they be willing to give the benefit of their judgment and experience as a matter of public duty. . . .The high calibre of men selected to serve on authority boards is. . .a tribute to the fine record of performance achieved by those authorities. And in turn, with top flight commissioners being appointed, the continuance of successful authority operation is assured. It's sort of a continuous, kindly cycle." Kurshan, *Authorities as a Governmental Technique*, 11 The Authority, Winter 1953, pp. 11-12.

55. FORDHAM, A LARGER CONCEPT OF COMMUNITY 24 (1956).

ing authority management, a magic aura of success has been attributed to the fact that authorities are self-supporting. But to be self-supporting means only that the authority's charges are no less than its expenditures; it is no guarantee of efficient operation at low cost, especially where the authority operates under monopoly or semi-monopoly conditions, and where there has been a pooling of profitable facilities with unprofitable ones. That authorities are self-supporting does not mean, therefore, that the cost to the consumer will be reduced.[56] On the other hand, it is no proof of inefficient municipal management merely because services are not self-supporting or that a city's budget does not balance.

Comparison of the relative efficiency of regular government and the authority, if it is to be meaningful, must take place on the plane of costs and services. That comparison does not seem to have been made to an extent sufficient to draw general conclusions.

Apart from costs, it is not clear that the authority has an advantage over the regular government on the basis of quality and independence of membership and flexibility of managerial controls.

In terms of political independence, it must be remembered that authority members, like many other government officials, are appointed by the mayor or governor.[57] An appointing official who is politically minded is not likely to immunize himself from political considerations in selecting authority members.[58] Even when businessmen are chosen, their appointment frequently is the result of their political rather than their business activity. On the other hand, the mayor or governor who supports merit appointments should attract qualified men for service within the regular governmental framework as well as within the authority.[59]

There is also the question of whether the board-of-directors type of management, which is typical of the authority,[60] is the most desirable

56. See Address by Lennox L. Moak, Thirteenth Annual Conference of Pennsylvania Municipal Authorities, Oct. 25, 1955, p. 3 (Bureau of Municipal Research of Philadelphia mimeo.)

57. There are a few exceptions; *e.g.*, in Pennsylvania, one member of the General State Authority is appointed by the Speaker of the House of Representatives and one by the President pro tempore of the Senate; in Nebraska, the directors of the power districts are chosen through popular elections; in New York, market authorities are named by county officials.

58. It is true that terms of authority members may overlap the term of the appointing official. But that is more of an aid to bipartisanship than non-partisanship.

59. In Philadelphia, for example, in recent years, there has been no dearth of capable businessmen, professional men and academicians serving on city departments, boards and commissions.

60. Boards and commissions, of course, may exist within the regular governmental unit. When they do, however, they are generally subject to controls from the city's executive officers. Moreover, the tendency in state and city government in recent years has been to diminish the number of such boards.

form of management for public enterprises. The private corporation, in terms of which the authority is often analyzed, is significantly different in that generally corporate officers are also directors, and they fashion corporate policy, as well as execute it, on a full-time basis.[61]

Moreover, the benefit of having successful citizens serve on boards may not be realized as frequently as popularly conceived. While the vigorous young corporate executive may contribute greatly to public enterprise, he may also be so busy with his corporate affairs that he can devote little time to his public office; on the other hand, the tired retired "chairman of the board," while he may be able to afford the time, may contribute less imagination than inflexibility.[62]

In any event, whether department, board or authority, there is a need in government for men of intelligence and initiative, dedication and imagination. The authority device is no *sine qua non* for the attraction of such men. Nor is the mayor or governor who is willing to appoint and support such men confined to one governmental device.[63]

In the case of freedom from managerial controls in such areas as personnel and purchasing, it is true that the authority enjoys greater freedom and flexibility than the regular state and local governments. But from the public viewpoint, the "advantage" of such freedom is dubious. One may recall that it was the undesirability of such flexibility where the public was concerned that led to their circumscription in the first instance.[64]

If civil service is the best method of obtaining and retaining good personnel on the regular governmental level, it is difficult to see why

61. Professor Austin F. Macdonald, who has been an influential voice in many state and local reorganizations, makes a strong case against board management. In MACDONALD, AMERICAN STATE GOVERNMENT AND ADMINISTRATION 340 (5th ed. 1955) he states: "Another good reason for preferring individuals to boards is that the single-headed department plan is more likely to lead to the performance of administrative duties by technical experts. Even though a board is composed of laymen who admittedly have no understanding or appreciation of the problems involved and must therefore hire a trained administrator to carry on the day-to-day routine, there is seldom a disposition to give the administrator a free hand in the performance of the work for which he has been employed. The members of the board, forgetful or careless of their ignorance, are likely to interfere with every detail. They may, and often do, insist upon examining the persons whom the administrator has selected as subordinates—or, worse still, appointing their friends and followers to important positions. This is not just a theoretical danger; long and bitter experience has shown that it is a common trend in the field of American public administration."

62. The mayor in one large eastern city, not long ago, appointed the presidents of some of the city's most prominent corporations to a board organized to deal with the city's traffic problems. Each member of the board had long enjoyed relative autonomy in his business corporation. The result was chaotic. After six months of facing the firm and varied views of rugged individualists, the chairman resigned with the suggestion to the mayor that the whole board be scrapped.

63. See ENO FOUNDATION FOR HIGHWAY TRAFFIC CONTROL, PARKING; LEGAL, FINANCIAL, ADMINISTRATIVE 84-86 (1956).

64. See FIELD, SIKES & STONER, STATE GOVERNMENT c. 13 (3d ed., Bates & Field 1953).

it should not hold good for the authority. The authority is not immune to the demands of politicians for patronage; indeed, in some cities where civil service is extensive, the authority is perhaps the last refuge of the patronage seeker.[65]

Similarly, if competitive bidding procedures are desirable for the municipal government, why should they not be desirable for the authority?[66] Authorities are not immune from favoritism and politics in their contracts, and the public trust can be abused by part-time members as well as by regular government officials. The need for flexibility of controls should not be confused with abdication of controls. The fact that bidding and purchasing requirements in many municipalities may be outmoded points to their revision,[67] not their rejection.

It is significant that the trend in legislation dealing with authorities has been to impose requirements of merit selection, competitive bidding, budgeting and accounting and other controls found in normal municipal operation.[68] The experience of public administration indicates that, as more abuses are discovered in authority operation, more controls are imposed.

In sum, the managerial superiority of the authority does not seem to have been demonstrated, while its freedom from controls does not appear to be entirely desirable. If municipal governments continue to revise their managerial controls to conform to modern concepts of governmental administration, there would appear to be little need to establish authorities for management reasons alone.

PLANNING AND RESPONSIBILITY

An authority that exercises its functions within the geographical limits of one general function unit[69] invariably poses problems for the state or city planners.

Most state and local authorities have been conceived for a single or limited purpose job. Even if more than one project

65. In Philadelphia, for example, it is no secret that prospective employees of most of the local authorities obtain political clearance before they are employed, a situation that does not exist in the case of regular city employers who are under a board civil service system. PHILADELPHIA HOME RULE CHARTER § 7-401.

66. The purpose of competitive bidding is to obtain "the best results at the lowest price and to forestall fraud, favoritism and corruption in the issuing of contracts." RHYNE, THE LAW OF MUNICIPAL CONTRACTS WITH ANNOTATED MODEL FORMS 35 (1952) and cases cited therein.

67. See FIELD, SIKES & STONER, *op. cit. supra* note 64, at 351; RHYNE, *op. cit. supra* note 66, at 21-24.

68. COUNCIL OF STATE GOVERNMENTS, PUBLIC AUTHORITIES IN THE STATES 80-88, 106-109 (1953).

69. A general function unit refers to the regular governmental body operating in all areas of government, *viz.*, a township, city, county and state.

is involved, the projects generally fall within a single area such as transportation, sewage, port facilities or the like. Planning by the authority, even where sufficiently developed, is inevitably centered around its area of operation.

Municipal and state planning, however, cannot be as single-minded.[70] The development of playgrounds, for example, is related to the planning of residential developments; the desirability of airport locations may depend on the question of planned industrial developments. In this broad framework the authority is often a single trader pursuing its own projects without participation in the over-all planning program.

The Joint Committee on Urban Traffic Congestion of the American Bar Association has expressed the point in the context of parking authorities as follows:

> "The main disadvantage of a parking authority appears to to be the use of an ad hoc governmental unit in an area where integrated planning is of the utmost importance. The provision of parking facilities is only one aspect of any urban traffic problem. Closely related are the problems of street use, encouragement of mass transportation, encouragement of private enterprise solutions, and other aspects of city planning development. The parking authority frequently proceeds to provide parking facilities before the relationship of these facilities to the whole traffic problem has been thought out and a fully integrated program decided upon. The initiative and spirit demonstrated by parking authority projects moving at a rapid pace in a manner stimulating private development, may seem commendable at the time but the projects may eventually prove unsound and unrelated to the city's overall plan to solve its traffic problems." [71]

The legislature can, of course, require the authority to obtain the clearance of the appropriate planning body.[72] But such requirement would not appear to provide an adequate solution to the problem. An example drawn from the writer's experience will help to illustrate.

A few years ago the parking authority of a large eastern city selected a particular area for the construction of a parking garage. Plans were prepared for submission to the city's planning commission. At the meeting of the planning commission, the most prominent mem-

70. See PUBLIC ADMINISTRATION SERVICE No. 86; ACTION FOR CITIES, A GUIDE FOR COMMUNITY PLANNING 1-3 (1945); MACDONALD, *op. cit. supra* note 61, at 407-15; FORDHAM, LOCAL GOVERNMENT LAW 695-96 (1949).

71. ENO FOUNDATION FOR HIGHWAY TRAFFIC CONTROL, PARKING; LEGAL, FINANCIAL, ADMINISTRATIVE 88 (1956).

72. Such a requirement, however, does not appear to be typical in the case of most authorities at the present time.

bers of the authority appeared—representatives of stores in the neighborhood of the proposed garage, members of the chamber of commerce and other proponents of the garage. The commission's ideas for that area were hardly in a formative stage. There had been some talk of encouraging multi-story housing facilities on the site. But now the planning commission was faced with the necessity of an immediate decision.

In dealing with regular city departments, this commission had the assurance that its decisions would be enforced by the city's chief executive. But dealing with an independent public body was a different matter. The authority considered itself on an equal governmental level. With due subtlety the authority indicated that if the commission's decision was delayed or unfavorable, the commission faced a battle with the authority. The authority had its own publicity department; some of its members were politically active in a party opposite to the city administration; it had a record of successful achievement. Had the planning commission resisted under such circumstances, it would have been a rare act indeed. The garage was authorized. A few years later, when it was too late, the garage proved to be an obstacle rather than an aid to the solution of the city's problems.

Planning by its nature looks to the coordination and integration of governmental functions. There is an over-all and continuing aspect to planning that requires involvement of all of the community resources. On the local and state level, the fragmentation of public functions among many independent bodies pursues, in effect, a counter philosophy.

The disadvantage of the local authority from the planner's viewpoint may have been obscured by the confusion of the purposes of local authorities with those created on a bi-state and regional level. A different situation is presented in the latter case since such bodies are often the result of a comprehensive plan for a region [73] which, because of the confinements of political boundaries, can be implemented only through the creation of area development authorities. It should be noted, however, that even along interjurisdictional lines, there has arisen a hodge-podge of authorities performing similar or identical services and engaged in uneconomic competition,[74] which points to the

73. For example, the comprehensive plan for the New York-New Jersey port area developed by the New York-New Jersey Port and Harbor Development Commission in 1920 led to the creation of the New York Port Authority in 1921. See Edelstein, *The Authority Plan—Tool of Modern Government*, 28 CORNELL L.Q. 177 (1943); Goldstein, *Metropolitan Area Government—A Functional Approach, the Authority Role*, The Bond Buyer, Sept. 8, 1956, pp. 3, 39-41.

74. See Nehemkis, *The Public Authority: Some Legal and Practical Aspects*, 47 YALE L.J. 14, 29-33 (1937).

need of a broader planning base that will encompass and direct the work of all of the authorities in a particular region.[75]

The merits and demerits of the state and local authority must also be evaluated in the area of political philosophy. It is a tenet, if not an axiom, of democratic society that government be politically responsible to the electorate.[76] If we are to divorce a governmental body from direct control of politically responsible officers, it seems fair to ask that the reasons for such divorcement be compelling ones.

Proponents of the authority have offered justification in the claim that certain types of entrepreneurial action can be more efficiently managed if made independent of the regular channels of government.[77] Such justification (if factually correct), might be adequate if use of the authority meant only the choice of a management device. Invariably, however, use of the authority cannot be insulated from questions of broad and significant governmental policy.

For example, one of the significant questions facing state and local governments is the extent to which "benefit received" principles should be the yardstick for public improvements. Under the "benefit received" concept, improvements are paid by charges upon users. The advantages claimed for this concept are that it avoids the necessity of heavier tax burdens, it provides the consumer with concrete evidence of the value of his payments, and it serves as a measure for the determination of the extent of need and of popular demand.[78] On the other hand, traditionally in a democratic society the creation of governmental services has not depended on the potential ability of the using public to pay for the service, but upon such tests as the general welfare of the community, the development of an area and a standard of the minimum level of services.

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75. This is not a suggestion that regional general function units should be established. However, for some possible developments along interstate lines, see FORDHAM, A LARGER CONCEPT OF COMMUNITY c. 2 (1956); Edelstein, *supra* note 73, at 190.

76. It is a generally accepted principle of political organization that responsibility is weakened by the diffusion of governmental functions among numerous plural-headed agencies. The trend in political reorganizations of local and state governments has been toward integration or centralization of executive authority. See COMMISSION ON INTERGOVERNMENTAL RELATIONS, A REPORT TO THE PRESIDENT FOR TRANSMITTAL TO THE CONGRESS 44-45 (1955); COUNCIL OF STATE GOVERNMENTS, THE ADMINISTRATIVE ORGANIZATION OF STATE GOVERNMENT 4-7 (1950); BUCK, THE REORGANIZATION OF STATE GOVERNMENTS IN THE UNITED STATES 14-28 (National Municipal League 1938).

77. See discussion at pp. 562-65 *supra.*

78. An evaluation of the "benefit received" doctrine is found in TEMPORARY STATE COMMISSION ON COORDINATION OF STATE ACTIVITIES, FIRST INTERIM STAFF REPORT ON PUBLIC AUTHORITIES UNDER NEW YORK STATE 25-30 (1954). In practice, the advantages are not always realized; for example, the claim that projects serve as an objective criteria of need loses force where, as is often the case, there is a pooling of profitable and unprofitable projects, or where projects receive subsidization in the form of direct grants, use of government facilities, tax exemptions and other means.

The choice between following benefit-received principles and the traditional criteria appears to be the kind of policy decision elected officials should properly make and be responsible for, not only initially but on a continuing basis. That decisional process for each project is largely lost by use of the authority device which, by its nature, is committed to benefit-received principles in the operation of its projects.[79]

Similarly, whether users of a profitable project should support nonprofitable projects, or what priority should be assigned to given projects, or what the comparative merits are, in the case of each project, of financing from tax revenues, general obligation issues or revenue bonds, are all questions involving basic governmental policy. To remove such questions from the regular orbit of governmental control is to remove them from responsibility to the electorate.[80] The benefits that accrue from the authority do not appear sufficient to justify such departure from our governmental philosophy.

CONCLUSION

The need for the authority appears greatest on the bi-state or regional level as a means of handling problems that cross jurisdictional lines. On a state and local level, however, the authority does not appear as attractive an instrument as has been commonly supposed. Its financing devices are now available in most jurisdictions to municipal and state governments. Its management advantages are largely unproved. In the planning area, it may prove disruptive of efforts to integrate community efforts along the lines of a comprehensive plan. And on the level of political responsibility it presents a departure from democratic traditions unwarranted by need or experience.

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79. Apart from the difference in governmental philosophy represented by the two approaches, it should be remembered that the cost of authority financing is significantly higher than the cost of general obligation issues. See survey by COUNCIL OF STATE GOVERNMENTS, PUBLIC AUTHORITIES IN THE STATES 70-75 (1953). The cost factor would also seem to be an element that should be reviewed on a continuing basis by politically responsible officials.

80. See NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, LOCAL GOVERNMENT AND HOME RULE 244 (1938); Moak, *Let Us Serve the Public,* 14 The Authority, Sept. 1956, pp. 18-19. The discussion here has related chiefly to the local and state authority; however, lack of democratic responsibility in the case of the bi-state authority is also a serious problem, as has been ably discussed in Netherton, *Area-Development Authorities: A New Form of Government by Proclamation,* 8 VAND. L. REV. 678, 691-97 (1955). On the bi-state level, however, the alternatives to authority operation are not as available as they are on the state and municipal level.